L.F.N. Restaurant, Inc. d/b/a Nanni Restaurant *and* Local 100, UNITE HERE

L.F.N. Restaurant, Inc. d/b/a Nanni Restaurant *and* Marc Fareri. Cases 02–CA–152777 and 02–CA–156322

April 19, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the consolidated complaint (complaint) or the amendment to the complaint. Upon charges filed by Local 100, Unite Here (the Union) in Case 02–CA–152777 on May 21, 2015, and by Mark Fareri, in Case 02–CA–156322, on July 20, 2015, the General Counsel issued a complaint on November 30, 2015, against L.F.N. Restaurant, Inc. d/b/a Nanni Restaurant (the Respondent). The complaint alleges that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by failing to continue in effect the terms and conditions of certain provisions of an expired collective bargaining agreement with the Union, and that it violated Section 8(a)(1) of the Act by discharging an employee for engaging in protected concerted activity. The Respondent failed to file an answer.

On January 12, 2016, the General Counsel issued an amendment to the consolidated complaint and Order rescheduling hearing seeking an additional remedy for the Respondent's alleged unfair labor practices. However, the Respondent failed to file an answer to the complaint or the amendment to the complaint.

On February 3, 2016, the General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on February 9, 2016, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. Here, the complaint affirmatively stated that unless an answer was received by December 14, 2015, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that by letter dated December 22, 2015, the Region advised the Respondent that unless an answer was received by December 30, 2015, a motion for default judgment would be filed. In addition, the January 12, 2016 amendment to the complaint affirmatively stated that an answer was due by January 26, 2016, and again warned the Respondent that if no answer was filed by that date, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. On January 26, 2016, the Respondent requested an extension of time to respond to the complaint, and the Region extended the deadline for an answer to February 2, 2016. Nonetheless, the Respondent again failed to file an answer.

In the absence of good cause being shown for the failure to file an answer, we deem the allegations of the complaint to be admitted as true, and we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a New York corporation with an office and principal place of business located at 146 East 46th Street (the facility), the sole facility involved herein, and has been engaged in the operation of a restaurant in New York, New York.

Annually, the Respondent, in the course and conduct of its operations derives gross revenue in excess of $500,000, and purchases and receives at its facility goods and materials valued in excess of $5000 directly from suppliers located outside New York State.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and/or agents of the Respondent within the meaning of Section 2(13) of the Act:

Vittorio Miriel	Owner
Silvio Scalano	Owner
Michael Zara	Owner

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All dining room and kitchen employees employed by the Employer.

Since about 1987 and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and since then the Union has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from November 1, 2011, to October 31, 2014 (the 2011–2014 collective-bargaining agreement).

At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Article 18 of the 2011–2014 collective-bargaining agreement, among other things, provides in pertinent part that:

> i. Seniority shall govern with respect to lay-off and recall.
>
> ii. If, as a result of the diminution of business, the Employer wishes to reduce the number of employees by laying off one or more employees, such lay off shall be effectuated only upon two weeks prior written notice to the Union.

Article 19 of the 2011–2014 collective-bargaining agreement, among other things, provides in pertinent part that:

> i. The Employer may summarily discharge, suspend or discipline an employee for physical fighting on the Employer's premises, being under the influence of liquor or drugs who [sic] on duty, dishonesty in connection with his employment or engaging in an unauthorized work stoppage.
>
> ii. If the Employer desires to discharge, suspend or discipline an employee for causes other than specified above, the Employer shall notify the Union in writing at least six business days in advance of the intended discharge, suspension or discipline during which time the Union may investigate the grounds therefore. The Employer and the Union shall have a conference within a reasonable time after the Union's receipt of said notice to discuss and attempt to resolve the matter. If the matter is not resolved, it shall be processed in accordance with the grievance procedure set forth in this Agreement. Pending resolution or final determination by arbitrator's award, the employee in question shall not be removed from the job. Notwithstanding the immediately preceding sentence, if the Employer discharges or suspends the employee from his employment prior to resolution of the matter or the rendering of an arbitrator's award, the Employer shall continue to pay wages and all other benefits to the employee, including an amount equal to the tips that the employee had been reporting prior to removal from employment, beginning the day of the employees' discharge or suspension from employment and continuing until the date of resolution or the arbitrator's award.

The following events occurred, giving rise to these proceedings.

1. (a) About January 5, 2015, the Respondent failed to continue in effect the terms and conditions of Article 18 and/or Article 19 of the 2011–2014 collective-bargaining agreement by failing to provide notice to the Union of the January 19, 2015 lay-off or discharge of Jose Felix Vasquez, in accordance with the terms of the agreement.

(b) About May 1, 2015, the Respondent failed to continue in effect the terms and conditions of Article 19 of the 2011–2014 collective-bargaining agreement by failing to provide notice to the Union of the May 11, 2015 discharge of Raffaele Federico, in accordance with the terms of the agreement.

(c) About March 17, 2015, the Respondent failed to continue in effect the terms and conditions of Article 19 of the 2011–2014 collective-bargaining agreement by failing to provide notice to the Union of the March 24 or 25, 2015 discharge of Marc Fareri, in accordance with the terms of the agreement.

(d) The terms and conditions of employment described above in subparagraphs (a), (b), and (c) are mandatory subjects of bargaining for the purpose of collective bargaining.

(e) The Respondent engaged in the conduct described above in subparagraphs (a), (b), and (c) without giving the Union notice and an opportunity to bargain about that conduct.

2. (a) About mid-March 2015,[1] the Respondent's employee, Marc Fareri, claimed the right to be paid wages owed to him by the Respondent in accordance with Article 6 of the 2011–2014 collective-bargaining agreement.

(b) About March 24 or 25, 2015, the Respondent discharged Fareri as described above in paragraph 1(c).

(c) The Respondent discharged Fareri because Fareri engaged in the activity described above in subparagraph

[1] The complaint inadvertently omitted the year 2015.

(a), and to discourage employees from engaging in these or other concerted activities.

CONCLUSIONS OF LAW

1. By the conduct described in paragraph 1 above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act.

2. By the conduct set forth in paragraph 2 above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

3. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally failing to provide notice to the Union, in accordance with Article 18 and/or Article 19 of the 2011–2014 collective-bargaining agreement, of the January 19, 2015 lay-off or discharge of Jose Felix Vasquez, the May 11, 2015 discharge of Raffaele Federico, and the March 24 or 25, 2015 discharge of Marc Fareri, we shall order the Respondent to notify and, on request, bargain collectively and in good faith with the Union before implementing any changes in wages, hours, or other terms and conditions of employment. In addition, we shall order the Respondent to rescind the unilateral change, and resume providing the Union with notice of layoffs and discharges in accordance with Articles 18 and/or 19 of the 2011–2014 collective-bargaining agreement, until a new agreement has been reached or a lawful impasse in negotiations occurs. We shall also order the Respondent to offer Vasquez, Federico, and Fareri full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. In addition, we shall order the Respondent to make each of these employees whole for any losses sustained as a result of its unlawful conduct, in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).[2]

The Respondent additionally shall be ordered to remove from its files any references to the employees' unlawful discharges and layoffs and to notify them in writing that this has been done and that the unlawful actions will not be used against them in any way. We shall further order the Respondent to compensate Vasquez, Federico, and Fareri for any adverse tax consequences of receiving lump-sum backpay awards and to file, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report with the Regional Director for Region 2 allocating backpay to the appropriate calendar quarters.[3] *Advoserv of New Jersey, Inc*., 363 NLRB No. 143 (2016).

ORDER

The National Labor Relations Board orders that the Respondent, L.F.N. Restaurant Inc. d/b/a Nanni Restaurant, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with Local 100, UNITE HERE as the exclusive representative of employees in the following appropriate unit, by unilaterally failing to provide notice to the Union of layoffs and discharges, in accordance with Article 18 and/or 19 of the 2011–2014 collective-bargaining agreement. The bargaining unit is:

> All dining room and kitchen employees employed by the Employer.

(b) Discharging employees because they claim the right to be paid wages owed to them by the Respondent, and to discourage employees from engaging in that or other protected concerted activities.

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[2] In the amendment to the complaint, the General Counsel requests that Vasquez, Federico, and Fareri be reimbursed for any out-of-pocket expenses incurred while searching for work as a result of the discrimination against them. Because the relief sought would involve a change in Board law, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by the affected parties, and there has been no such briefing in this case. Accordingly, we decline to order this relief at this time. See, e.g., *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004), and cases cited therein.

[3] Having also found that the Respondent has violated Section 8(a)(1) by discharging employee Marc Fareri because he claimed the right to be paid wages owed to him by the Respondent in accordance with article 6 of the 2011–2014 collective-bargaining agreement and to discourage employees from engaging in that or other protected concerted activities, we find that Fareri is entitled to each of these remedies under that provision of the Act as well.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of its employees in the appropriate unit.

(b) Resume providing the Union with notice of layoffs and discharges in accordance with the terms of Articles 18 and/or 19 of the 2011–2014 collective-bargaining agreement, until a new agreement is reached with the Union or a lawful impasse in negotiations occurs.

(c) Within 14 days from the date of this Order, offer Jose Felix Vasquez, Raffaele Federico, and Marc Fareri full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Jose Felix Vasquez, Raffaele Federico, and Marc Fareri whole for any loss of earnings or benefits they may have suffered as a result of the Respondent's unlawful conduct in the manner set forth in the remedy section of this decision.

(e) Within 14 days of the date of this Order, offer Jose Felix Vasquez, Raffaele Federico, and Marc Fareri full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge or layoff of Jose Felix Vasquez and the unlawful discharges of Raffaele Federico and Marc Fareri and within 3 days thereafter, notify them in writing that this has been done and that the discharges and/or layoff will not be used against them in any way.

(g) Compensate Jose Felix Vasquez, Raffaele Federico, and Marc Fareri for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 5, 2015.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 19, 2016

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Local 100 UNITE HERE as the exclusive collective-bargaining representative of our unit employees by unilaterally failing to provide notice to the Union of layoffs and discharges, in accordance with Article 18 and/or 19 of the 2011–2014 collective-bargaining agreement. The bargaining unit is:

> All dining room and kitchen employees employed by the Employer.

WE WILL NOT discharge you because you claim the right to be paid wages owed to you, and to discourage you from engaging in that or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of our unit employees.

WE WILL resume providing the Union with notice of layoffs and discharges in accordance with the terms of Articles 18 and/or 19 of the 2011–2014 collective-bargaining agreement, until a new agreement is reached with the Union or a lawful impasse in negotiations occurs.

WE WILL, within 14 days from the date of the Board's Order, offer Jose Felix Vasquez, Raffaele Federico, and Marc Fareri full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jose Felix Vasquez, Raffaele Federico, and Marc Fareri whole for any loss of earnings and other benefits resulting from their unlawful discharges or layoff, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful layoff or discharge of Jose Felix Vasquez and the unlawful discharges of Raffaele Federico and Marc Fareri, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges and/or layoff will not be used against them in any way.

WE WILL compensate Jose Felix Vasquez, Raffaele Federico, and Marc Fareri for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

L.F.N. RESTAURANT, INC. D/B/A NANNI RESTAURANT

The Board's decision can be found at www.nlrb.gov/case/02-CA-152777 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half St., S.E., Washington, D.C. 20570, or by calling (202) 273–1940.